Completed acquisition by JLA New Equityco Limited through its subsidiary Vanilla Group Limited of Washstation Limited

Decision to impose a penalty on JLA New Equityco Limited and Vanilla Group Limited under section 94A of the Enterprise Act 2002

Case ME/6792/17

Decision

1. The Competition and Markets Authority (**CMA**) hereby gives notice[1] to JLA New Equityco Limited (**JLA**)[2] and Vanilla Group Limited (**Vanilla**)[3] that it has decided to impose a penalty on JLA and Vanilla under section 94A of the Enterprise Act 2002 (**EA02**) because it considers that they have, jointly and severally, without reasonable excuse, failed to comply in certain respects with the initial enforcement order issued by the CMA under section 72 of the EA02 on 13 December 2017 (the **IEO**). The proposed penalty is a fixed amount of £120,000.

A Executive Summary

Failure to comply with the IEO

2. The CMA has investigated the completed acquisition by JLA through its subsidiary Vanilla of Washstation Limited (**Washstation**) (**the Merger**).

3. In the course of the CMA's in-depth, Phase 2, investigation of the Merger, which commenced on 16 April 2018 (some 4 months after the IEO had come

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[1] In accordance with paragraph 5.2 of Administrative Penalties: Statement of Policy on the CMA's Approach (CMA 4).

[2] A private company registered in Jersey, registration number 119729

[3] A private limited company registered in England, registration number 02566320

into force), the Monitoring Trustee appointed by JLA[4] reported to the CMA in June 2018 that a number of laundry machines had been sold by JLA to the former owner of Washstation in January 2018.

4. The CMA has investigated the matter and decided that, after the IEO had come into force, JLA had entered into and implemented an agreement pursuant to which JLA sold the entirety of the stock of Maytag machines - which included machines that had been acquired by JLA as part of the Merger - (the **Maytag Stock**) to the former owner of Washstation, Mr V, in his capacity as CEO of Included Laundry Ltd (**Included Laundry**). JLA did not seek the CMA's consent either to enter into or implement this agreement.

5. The CMA finds that JLA and Vanilla have failed to comply in certain respects (as set out in more detail below) with the IEO. The failure to comply comprised selling the Maytag Stock in January 2018 without seeking the consent of the CMA. Such action might have impaired the ability of the Washstation business to compete independently, and constituted a failure to procure that none of the assets of the Washstation business or the JLA business was disposed of (except in the ordinary course of business for the separate operation of the two businesses).

6. It was foreseeable that the sale might arouse the reasonable concern of the CMA, given that the entirety of the Maytag Stock was being sold, and JLA or Vanilla should, therefore, have obtained the prior written consent of the CMA for the sale.

No reasonable excuse

7. JLA submitted that it had a reasonable excuse for the alleged breach and advanced a number of reasons why that was the case. However, the CMA finds that in the circumstances JLA and Vanilla had no reasonable excuse for failing to comply with the requirements of the IEO.

Decision to impose a penalty

8. The CMA considers that it is appropriate to impose a penalty in the interests of specific and general deterrence and because of the seriousness of the breach.

9. The CMA has taken into account that the CMA discovered from the response of Mr V to a Notice from the CMA dated 17 September 2018 requiring documents and information, that there were avoidable gaps in the

[4] The appointment was pursuant to directions issued by the CMA on 8 May 2018.

documents and information provided by JLA on 28 August 2018 in relation to the sale. In particular, email documents, which had been sent within JLA in relation to the sale of the Maytag Stock, had not been provided to the CMA. This caused the CMA to expend further resources in investigating the matter, resulting in increased public expense.

10. In determining the amount of the penalty, the CMA has taken account of these factors, as well as certain aggravating and mitigating factors, and the financial position of JLA and Vanilla.

11. The CMA considers that a penalty of £120,000 (which is below the statutory maximum of 5% of the total value of the global turnover of the enterprises owned or controlled by JLA and Vanilla) is an appropriate and proportionate penalty.

B Factual Background

The Merger

12. On 18 May 2017, JLA acquired, through its subsidiary Vanilla, all the issued share capital of Washstation. The transaction was not notified to the CMA, but the CMA became aware of the Merger on 30 October 2017, through its merger intelligence function.

13. On 13 December 2017, the CMA made the IEO for the purpose of preventing pre-emptive action, that is to say, action which might prejudice a reference of the Merger or impede the taking of any action under Part 3 (Mergers) of the EA02 which may be justified by the CMA's decisions on the reference.[5]

14. The businesses of JLA and Washstation overlap in the supply of managed laundry services, mainly to universities, colleges and student accommodation providers.

15. On 16 April 2018, the CMA decided to refer the Merger for an in-depth (Phase 2) investigation under section 22 of the EA02.

16. On 8 May 2018, the CMA issued directions under the IEO for JLA to appoint a Monitoring Trustee and a Hold Separate Manager.

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[5] Section 72(8) of the EA02.

The Sale of the Maytag Stock

17. In June 2018, in the course of the CMA's detailed, second-stage investigation of the Merger, the Monitoring Trustee appointed by JLA reported to the CMA that a number of laundry machines had been sold in January 2018 by JLA to the former owner of Washstation, Mr V, in his capacity as CEO of Included Laundry.

18. The CMA's investigation of the circumstances of the sale are summarised in Appendix 1.

19. The Maytag Stock that was the subject of the sale comprised 145 new Maytag machines (226 Pockets[6]), 6 used Maytag machines (7 Pockets) and 5 used non-Maytag machines (7 Pockets) which JLA had acquired as part of the Washstation transaction, or in anticipation of planned Washstation business installations, or already had in stock (see the following paragraph).

20. JLA explained the background to the sale of machines to Mr V by stating that:

> 'The sale of machines to [Mr V] comprised machines that had been acquired by JLA as part of the Washstation transaction, alongside machines which JLA already had in stock and machines which JLA had acquired in anticipation of planned Washstation installations, but were subsequently surplus to requirements. In other words, they were not required in the Washstation business (as they had been acquired by Washstation and JLA for installation at customer' sites who decided, post-Merger, to use a JLA proposal and Alliance machines). Furthermore, as they were Maytag machines they were not needed in JLA's on-going business.'[7]

21. Mr V stated[8] that, at the end of November 2017, Mr P (Trade & Export Sales Director) and Ms Q (National Trade Manager) at JLA contacted him saying that they had Washstation Maytag stock for sale and asked him whether he was interested in acquiring this stock. Mr V stated that an initial stock list and price of £[✂],000 plus VAT was discussed during the telephone conversation.

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[6] A machine may consist of one component, for example a washing machine or a dryer, or it may consist of more than one component, for example a washing machine and a dryer, or two washing machines, or two dryers. Each component is termed a 'pocket'.

[7] Response of JLA dated 28 August 2018 to the section 109 Notice, at paragraph 2.2.

[8] Email response of Mr V to CMA dated 17 September 2018.

22. On 30 November 2017, Ms Q sent a stock list by email to Mr V stating:

> '… as per our telephone conversation please see the full stock list.
>
> Please make us a realistic offer !!'.

23. On 1 December 2017, Mr V made an 'initial tentative offer' subject to 'conducting a stock count' to buy the Maytag Stock for £[✂],000 plus VAT. Collection was to be made from JLA's Guildford warehouse at Mr V's expense. The email from JLA to Mr V, dated 1 December 2017, setting out details of the offer, was copied to JLA's Chief Finance Officer, Mr R, as well as to Mr P. The email concluded: 'I look forward to your confirmation in writing, once this is received we can then make arrangements for a visual inspection in Guildford'.

24. In reply, Mr V, in an email dated 1 December 2017, stated that he would 'look at this over the weekend and will give you a Yes or No on Monday'. However Mr V told the CMA that he subsequently found that 'The stock didn't not (*sic*) reconcile with the initial stock list provided.'[9]

25. On 12 December 2017, JLA sent an email to Mr V stating: 'as your conversation with P please see the revised spread sheet with machine and pocket quantity'.

26. On 13 December 2017, JLA and Vanilla became subject to the obligations imposed by the IEO.

27. On 18 December 2017, at 2.53 pm Mr P at JLA sent an email to Mr T (JLA Group Supply Chain Director) who is based at JLA's warehouse at Ripponden, copied to Mr S (JLA Warehouse Operations Manager), and to Ms Q. This email included a chain of emails sent earlier that day within JLA, including one email stating that Mr V 'is going to buy the job lot, but it will be subject to seeing the photos and stock held here, he is currently viewing the remaining stock in the warehouse down south …' (this email was sent at 2.24pm). Mr P's email states: 'it is just all the new stock that he [Mr V] wants to see 1. quantity that they are 2. still in boxes and 3. in good condition'.

28. On 18 December 2017 at 3.51 pm, Mr P sent a photo of boxed and unboxed machines by email, headed 'RE: Ex Washstation Maytag stock in Ripponden', to Mr V and asked him 'Let me know how you wish to proceed.'

29. On 4 January 2018, Mr V made an offer of £[✂],000 for the revised machine and pocket quantity. Mr V subsequently explained to the CMA that: 'The 4th

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[9] Reply dated 17 September 2018 to the CMA's section 109 Notice to Mr V.

January 2018 I made an offer of £[✂],000 for the stock… The offer was made by telephone conversation between myself and P and was then confirmed by email'.[10]

30. Mr V's email to Mr P of 4 January 2018[11] stated:

> 'Further to our telephone conversation, I would like to confirm the purchase of 226 New Maytag pockets and 14 pockets of used machines for the total sum of 240 pockets.
>
> Purchase price £[✂],000.
>
> All machines from Ripponden warehouse will be transported down to a warehouse in the South of England at no additional cost.
>
> All machines will be picked up from Southern Storage by the end of January 18'.

31. JLA confirmed the sale by an email sent by Mr P in reply the same day saying:

> 'Thank you, V, all stock now allocated to Included Laundry. Q will organise the paper work and relocation of equipment in Halifax to the warehouse in the South of England for you to collect by the end of January 2018.'

32. Subsequently, on 11 January 2018, JLA (Ms Q) emailed Mr V saying:

> '… please see the pro-forma invoice, as we speak all Maytag stock from Yorkshire is currently being transferred to your warehouse in the South.
>
> To enable us to pass title ownership of the equipment, could you please make payment by return.'

33. The proforma invoice sent on 11 January 2018 was on JLA headed paper, it was dated 10 January 2018 and required payment to be made to 'JLA Ltd'. The purchase price of £[✂],000 plus VAT was paid on 29 January 2018 and the machines were collected by Mr V.

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[10] Reply dated 17 September 2018 to the CMA's section 109 Notice to Mr V.

[11] This email was sent on 4 January 2018 at 15:35 in Mr V's name from the email account of R @includedlaundry.com. It was sent to Mr P and copied to Mr V.

34. At no time did JLA notify the CMA of this sale or obtain the written consent of the CMA to the sale taking place.

35. The following emails, which were included in the documents provided to the CMA by Mr V, had not been provided to the CMA by JLA in response to the section 109 notice sent to JLA on 13 August 2018:

- 18 December 2017: 14:28 from: P to T; cc: S; Q – Subject: Ex Washstation Maytag stock in Ripponden
- 18 December 2017: 14:39 from S to P; cc: Q – Subject: Ex Washstation Maytag stock in Ripponden
- 18 December 2017: 14:53 from P to S; cc: Q – Subject: Ex Washstation Maytag stock in Ripponden
- 18 December 2017: 15:45 from S to P; cc: Q – Subject: Ex Washstation Maytag stock in Ripponden
- 18 December 2017: 15:51 from P to S; cc: Q; V – Subject: Ex Washstation Maytag stock in Ripponden
- 4 January 2018: 16:06 from P to W[12]; cc: V; Q – Subject: Maytag Equipment

36. These emails are inconsistent with JLA's explanation of the circumstances of the sale, which was based primarily on emails sent by JLA on or before 12 December 2017 (which JLA had provided to the CMA). In particular, the failure to provide the CMA with the email of 4 January 2018 at 16:06 from Mr P to W, copied to Mr V, gave a partial and potentially misleading impression of the events of 4 January 2018. This was important in establishing that a binding sale agreement with Mr V was made some three weeks after the IEO had come into force.[13]

The CMA's provisional decision on administrative penalty

37. On 29 January 2019, the CMA issued a provisional decision to impose a penalty on JLA and Vanilla under section 94A of the EA02.[14] JLA was given until 5 February 2019 to make written and oral representations. JLA

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[12] The primary addressee of this email is shown as 'R'. The email of 4 January 2018, sent by Mr P at 16:06, was in response to the email of 4 January 2018 at 15:35 from 'R [mail to: R @includedlaundry.com]'.

[13] See paragraphs 64 to 74 below.

[14] The CMA had sent JLA a letter dated 21 November 2018 stating its preliminary view that JLA and Vanilla had failed to comply with the IEO and JLA responded to this on 28 November 2018.

submitted its written representations on 8 February 2019, having been granted an extension by the CMA. JLA did not exercise its right to make oral representations.

38. On 20 February 2019, JLA submitted further written representations following the judgment of the Competition Appeal Tribunal ('**CAT**') in *Electro Rent Corporation v CMA*.[15]

39. The CMA has considered the submissions made by JLA and has reviewed its provisional decision accordingly.

40. In accordance with paragraphs 5.2 and 5.9 of the CMA's Guidance,[16] the CMA's General Counsel was consulted on the reasons for the proposed approach to, and level of, the penalty.

C Legal Framework

Relevant legislation and relevant provisions of the Initial Enforcement Order

Relevant legislation

41. Section 72(2) of the EA02 provides that the CMA may, by order, for the purpose of preventing pre-emptive action, impose certain restrictions and obligations.

42. Section 72(8) of the EA02 defines "pre-emptive action" as "action which might prejudice the reference concerned or impede the taking of any action … which may be justified by the CMA's decisions on the reference". Section 72 is the basis for the IEO.

43. Section 86(6) of the EA02 provides that an order made pursuant to section 72 is an enforcement order. Sections 94(1) and 94(2) of the EA02 provide that any person to whom such an order relates has a duty to comply with it. A company is a person within the meaning of section 94(2) of the EA02 and Schedule 1 to the Interpretation Act 1978.

44. Section 94A of the EA02 provides as follows:

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15 *Electro Rent Corporation v CMA* [2019] CAT 4.

16 Administrative penalties: Statement of Policy on the CMA's approach (CMA4), January 2014.

(1) Where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate.

(2) A penalty imposed under subsection (1) shall not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom it is imposed.

45. Section 94A(8) of the EA02 defines "interim measure" as including an order made pursuant to section 72 of the EA02.

46. Section 94B(1) of the EA02 requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty and how it will determine the level of the penalty imposed.[17]

47. Section 114 of the EA02 provides an appeal mechanism for a person on whom a penalty is imposed.

Relevant case law

48. The meaning of 'pre-emptive action' and role of interim orders in merger control has been considered by the CAT on a number of occasions.

49. In *Stericycle*[18] the CAT considered the meaning of pre-emptive action in section 80(10) of the EA02[19], and held that "*the word 'might' implies a relatively low threshold of expectation that the outcome of a reference might be impeded*".[20]

50. In *ICE/Trayport*[21] the CAT observed that "*'pre-emptive action' is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision"* and held that *"[t]he word 'might' means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The IEO catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the IEO to seek consent from the CMA if their conduct*

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[17] On 10 January 2014, the CMA published its statement of policy regarding its powers under section 94A of the EA02 amongst other provisions.

[18] *Stericycle International LLC v Competition Commission* [2006] CAT 21 ('*Stericycle*').

[19] The definition of "pre-emptive action" in section 80(2) of the EA02 is in identical terms to the definition in section 72(8) of the EA02.

[20] *Stericycle* at [129].

[21] *Intercontinental Exchange v CMA* [2017] CAT 6 ('*ICE/Trayport*').

creates the possibility of prejudice or an impediment".[22] The CAT also held that "*… where an IEO has been issued, it is incumbent on parties to take a carefully considered view as to whether their conduct might arouse the reasonable concern of the CMA that the agreements that they reach are significant enough that they might prejudice the reference or impede justified action*".[23]

51. More generally, in *Electro Rent*, the CAT noted that "*[the] CMA's role in regulating merger activity, and its ability to do so effectively, is a matter of public importance*" and agreed with the CMA's submission that interim orders serve a particularly important function where, as in the case in question, the merger has been completed before it was examined by the CMA.[24]

The Purpose of an IEO

52. The Supreme Court has held that "*[t]he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets*".[25] It is of central importance to the ability of the UK's voluntary, non-suspensory merger regime to regulate in advance the impact of a merger on the competitive structure of markets that interim measures should be effective, particularly where, as in this case, the merger is completed several months before it is identified and examined by the CMA.

53. The purpose of the IEO is to prevent any action which might prejudice the merger investigation (the reference concerned) or impede the taking of any action which may be justified by the CMA's decision on the reference.[26] The broad nature of pre-emptive action is reflected in the similarly broad wording of the IEO which the CAT held in *ICE/Trayport* "*should be interpreted to give full effect to its legitimate precautionary purpose*".[27]

54. The IEO contains positive obligations on the addressees to do certain things as well as obligations to refrain from taking certain actions. As noted above in paragraph 50, the onus is on the addressees to seek consent if their conduct creates the possibility of prejudice or an impediment.[28]

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[22] *ICE/Trayport* at [220].
[23] *ICE/Trayport* at [223].
[24] *Electro Rent Corporation v CMA* [2019] CAT 4, at [120].
[25] *Société Coopérative de Production SeaFrance SA v CMA* [2015] UKSC 75 at paragraph 4; see also paragraph 35.
[26] Section 72(8) of the EA02.
[27] *ICE/Trayport* at [220].
[28] *ICE/Trayport* at [220], emphasis added.

55. Where a merger has been completed, it is critical that the acquired business continues to compete independently with the purchaser's and is maintained as a going concern. If the acquired business were to be integrated more than necessary or its viability undermined pending the outcome of the merger investigation, this would risk impeding any action the CMA might need to undertake should it find the merger has resulted in an adverse effect on competition.

Relevant provisions of the IEO

56. The relevant provisions of the IEO are as follows.

57. Paragraph 4 of the IEO provides that, 'except with the prior written consent of the CMA, JLA and Vanilla shall not, during the specified period, take any action which might prejudice a reference of the transaction under section 22 of [the EA02] or impede the taking of any action under [the EA02] by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might: … (c) otherwise impair the ability of the Washstation business or the JLA business to compete independently in any of the markets affected by the transaction.'

58. Paragraph 5 of the IEO provides that: 'Further and without prejudice to the generality of paragraph 4 and subject to paragraph 3, JLA and Vanilla shall at all times during the specified period procure that, except with the prior written consent of the CMA: … (e) except in the ordinary course of business for the separate operation of the two businesses: … (ii) none of the assets of the Washstation business or the JLA business are disposed of'.

59. For the purposes of the IEO, paragraph 13 provides that: … '"the ordinary course of business" means matters connected to the day-to-day supply of goods and/or services by Washstation or JLA and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Washstation and JLA'.

60. Paragraph 3 confirms that no act or omission of JLA or Vanilla which occurred or was completed prior to the commencement date (ie 13 December 2017) will constitute a breach of the IEO.

61. Paragraph 7 requires (among other matters) the Chief Executive Officer of JLA and Vanilla to provide a compliance statement to the CMA every two weeks, in the form set out in the Annex to the IEO, confirming compliance with the IEO. A copy of the IEO and its Annex is at Appendix 2.

D. Legal Assesment

Failure to comply with the IEO

62. The IEO commenced (that is, it came into force) on 13 December 2017.[29] JLA accepts that when the IEO came into force JLA was, subject to specific and general terms of the IEO, required to cease to continue to act as it had done formerly.[30]

63. The CMA considers that the test for compliance with the IEO is to be applied as at the date of the proposed action. Accordingly, evidence of subsequent events is not relevant to the question of whether the proposed action engaged the requirement to obtain the prior written consent of the CMA.[31]

(i) The date of the agreement for the sale of the Maytag Stock

64. The CMA's assessment is that the evidence set out, in particular, at paragraphs 27 to 31 above, shows that Mr P on behalf of JLA and Mr V on behalf of Included Laundry entered into a legally binding agreement for the sale of the Maytag Stock on 4 January 2018 – that is, over three weeks after the commencement of the IEO.

65. In its representations to the CMA, JLA submitted that the date of the agreement for the sale of the Maytag Stock was on or around 4 December 2017 and, in any event, during that week and therefore before the IEO came into force.[32] JLA told the CMA that the final terms were agreed in a conversation, which was followed by an email from JLA to Mr V on 12 December 2017, hence in JLA's view the agreement had been reached on or before 12 December 2017 and therefore prior to the IEO.[33]

66. JLA submitted on this basis that, in accordance with paragraph 3 of the IEO,[34] the failure to seek the prior consent of the CMA to the sale did not constitute a breach of the IEO, as the agreement to sell the Maytag Stock

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[29] IEO paragraph 1.

[30] JLA response to the Section 109 Notice dated 13 August 2018 at paragraph 1.5.

[31] However, the evidence of subsequent events may be relevant to the assessment of the seriousness of any breach and the quantum of a potential penalty for failure to comply with the IEO.

[32] JLA response to the Section 109 Notice dated 13 August 2018 at paragraph 1.5; JLA Representations dated 28 November 2018, at paragraph 1.15.

[33] Ibid.

[34] Paragraph 3 of the IEO states: 'Notwithstanding any other provision of this Order, no act or omission shall constitute a breach of his Order, and nothing in this Order shall oblige JLA or Vanilla to reverse any act or omission, in each case to the extent that it occurred or was completed prior to the commencement date.' The commencement date was 13 December 2017.

occurred prior to the commencement date of the IEO on 13 December 2017.[35]

67. The CMA's view is that this explanation is not supported by the available evidence, in particular, the emails sent within JLA and between JLA and Mr V on 18 December 2017 and 4 January 2018 (as described above). For the reasons set out below, the CMA's view is that a legally-binding agreement was not entered into until after the commencement date of the IEO of 13 December 2017.

68. It is settled law that, in order for there to be a binding legal agreement, an unqualified offer must be made and accepted, on agreed terms, with the intention of creating legal relations.[36] In the present case, the evidence shows that Mr V's offer, made in his telephone conversation of 1 December 2017 with Ms Q, was qualified by being subject to satisfactory inspection of the stock. Indeed, JLA sent a revised spread sheet to Mr V on 12 December 2017 after he had carried out an inspection and was dissatisfied.

69. As regards JLA's submission[37] that a binding agreement between JLA and Mr V was made by telephone on 12 December 2017, JLA emails of 18 December 2017 show that although negotiations had advanced, any legally binding agreement was still subject to Mr V being satisfied after inspection of the stock and hence on agreement on final terms.

70. The CMA's view is that a legally binding agreement, including finally agreed terms, was eventually reached between JLA and Mr V, following Mr V's inspection of the stock, in the telephone conversation between Mr V and Mr P on 4 January 2018. This is demonstrated by the analysis of the evidence in the ensuing paragraphs.

71. Mr V told the CMA that: on '[t]he 4th January 2018 I made an offer of £[✂],000 for the stock… The offer was made by telephone conversation

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[35] JLA response to the Section 109 Notice dated 13 August 2018 at 1.1 and 1.2; JLA Representations dated 28 November 2018, at paragraph 1.17.

[36] See, for example, *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co* [2010] 1 WLR 753, at paragraph 45 where Lord Clarke said: 'The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.'

[37] JLA response to the Section 109 Notice dated 13 August 2018 at paragraph 1.5; JLA Representations dated 28 November at paragraphs 1.15 -1.16.

between myself and Mr P and was then confirmed by email'.[38] According to the emails provided to the CMA, Mr V wrote to Mr P: "Further to our telephone conversation, I would like to confirm the purchase of 226 New Maytag pockets and 14 pockets of used machines for the total sum of 240 pockets. Purchase price £[✂],000".[39]

72. MrP's response to Mr V, sent the same day, was "'Thank you, V, all stock now allocated to Included Laundry. Q will organise the paper work and relocation of equipment in Halifax to the warehouse in the South of England for you to collect by the end of January 2018' (see paragraph 31 above).

73. The exchange of emails on 4 January 2018 between Mr V and Mr P confirms that both sides were in agreement that there was a sale and on the terms of the sale. The CMA notes that the price to be paid for the stock - a material term of the agreement - was significantly different in the agreement reached on 4 January 2018 from the price originally offered by Mr V (£[✂],000 not £[✂],000). The purchase price of £[✂],000 plus VAT was paid on 29 January 2018 and the machines were collected by Mr V (see paragraph 33 above).

74. For these reasons, the CMA's view is that both the agreement and the performance of the contractual obligations entered into under that agreement in relation to the transfer of the Maytag Stock occurred after the commencement date of the IEO.

75. For completeness, the CMA notes JLA's submission that implementation of the agreement in January 2018 cannot amount to a breach of the IEO in circumstances in which the agreement was entered into before the IEO.[40] In support of its submission, JLA places great reliance on the following provisions of paragraph 3 of the IEO, which JLA quotes as follows: 'no act or omission shall constitute a breach of this Order, and nothing in this Order shall oblige JLA or Vanilla to reverse any act or omission, in each case to the extent that it occurred **or** was completed prior to the commencement date' (emphasis added by JLA).[41] JLA concludes that the fact that the action in question completed after the IEO came into force is irrelevant.[42]

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[38] Reply dated 17 September 2018 to the CMA's section 109 Notice sent to Mr V. In that reply, Mr V stated also: 'To the best of my recollection the telephone conversation occurred on the 4th January 2018 and was followed by an email confirmation… The content of the telephone conversation was confirmation of purchase of the Maytag machines for £[✂],00 [sic] +VAT'.

[39] Response of JLA dated 28 August 2018 to the section 109 Notice.

[40] JLA Representations dated 28 November at paragraphs 1.17, 1.18, 1.20 and 1.36.

[41] Ibid.

[42] JLA Representations dated 28 November at paragraph 1.19.

76. In the CMA's view, it is clear from the use of the words 'to the extent that' and 'or' (which JLA has emphasised) that where action has occurred (in this case, a legally binding agreement was entered into) and was subsequently completed (ie title to the Maytag Stock transferred to Included Laundry), both the occurrence and completion must take place before the commencement of the IEO for there to be no breach of the IEO. Thus, even if it were the case that a legally binding agreement had been entered into before the IEO commenced (which for the reasons stated above the CMA rejects), the subsequent implementation of the agreement (which JLA acknowledges occurred in January 2018[43]) means that that part of JLA's action fell outside the scope of the exception in paragraph 3 of the IEO.

(ii) Action which might impair the ability of the Washstation business to compete independently (paragraph 4(c) of the IEO)

77. The sale of the Maytag Stock to Mr V in his capacity as CEO of Included Laundry engages paragraph 4(c) of the IEO. That paragraph requires JLA and Vanilla, except with the prior written consent of the CMA, not to take any action which might impair the ability of the Washstation business or the JLA business to compete independently in any of the markets affected by the transaction (in effect, the Merger).

78. JLA has stated that in the period following completion of the Merger on 18 May 2017 until 13 December 2017 (when the IEO came into force) it took a number of actions and decisions as regards the Washstation business. In particular, all Washstation assets, including the Maytag Stock, were 'hived up' into JLA on 1 December 2017 (when Washstation ceased trading and all its assets and liabilities were transferred to JLA) and thereby became assets of JLA.[44]

79. A distinguishing characteristic between the JLA business and the Washstation business was that JLA used Alliance machines in its offering and Washstation used Maytag machines. The machines acquired by JLA from Washstation as a result of the Merger were the Maytag machines used in the Washstation business, and on which Washstation based its business model.

80. By selling the entirety of the Maytag Stock, which was the principal type of machine used by the Washstation business, JLA was taking action which reinforced the integration of the two businesses. This created a risk that

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[43] JLA Representations dated 28 November at paragraph 1.17.

[44] JLA Representations dated 28 November 2018 at paragraphs 1.5 and 1.6.

Washstation would be less able to compete independently in the relevant market. Such action therefore required the prior written consent of the CMA, to enable the CMA to decide whether, having considered the relevant facts, the sale should be allowed (in whole or in part) through derogation.

81. The sale by JLA of the Maytag Stock was significant because it meant that the *entirety* of the stock of Maytag machines available to Washstation at the time of the Merger and which were, or could have been made, available by JLA to Washstation after the Merger[45], was no longer available to the Washstation business.

82. Absent its sale, the Maytag Stock would have been available to the Washstation business to be offered to actual or potential customers. Through the sale of this stock to Mr V, JLA therefore reduced the stock of Washstation's most commonly-used type of machine that was available to the Washstation business.

83. The effect of this action by JLA was that it risked narrowing the options for the HSM[46] when the Washstation business was competing for new contracts. JLA had in effect created a situation in which (in accordance with the terms of the IEO that JLA makes sufficient resources available to the Washstation business[47]) it would supply the HSM with the Alliance machines favoured by JLA, rather than the Maytag machines formerly used by the Washstation business.

84. This had a practical consequence in that the HSM told the CMA that the cost of purchasing Alliance machines from JLA was approximately 45% higher than Washstation's pre-Merger arrangement with Maytag.[48] The HSM also told the CMA that Maytag delivery times were less reliable, and that lead times were a key factor in tenders.[49]

85. The HSM also told the CMA that in a tender for installation of laundry machines price is one of the main factors.[50] The HSM stated that if machine

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[45] JLA informed the CMA that all Washstation assets, including the machines, were 'hived up' into JLA on 1 December 2017 when Washstation Limited ceased trading and all its assets and liabilities were transferred to JLA (JLA representations letter dated 28 November 2018, at paragraph 1.6).

[46] The HSM was appointed by JLA at the direction of the CMA under the IEO to manage the Washstation business during the investigation of the Merger.

[47] IEO paragraph 5(b).

[48] Email exchange dated 31 July 2018 between the CMA and the HSM. Some of this difference in price was due to the depreciation of sterling against the dollar, but the cost was stil about 30% higher in dollar terms.

[49] Note of discussion of 4 June 2018 between CMA and HSM of consequences of not having Maytag machines available.

[50] In one contract, the cost of the machines represented 68% of annual net income, before service and share-payment costs.

costs were higher than before, this reduced the cash available to fund the investment in people and systems needed to meet the relevant service and maintenance contractual terms, which were another key factor in a tender.[51]

86. The HSM told the CMA that price is not the only factor in winning a contract – for example, the ability to install large projects in a short timetable may be very important. Nevertheless, as noted above, since the sale of the Maytag Stock risked narrowing the options available to the HSM and to the extent that it increased the costs for the HSM of running the Washstation business, the sale risked weakening or damaging the Washstation business.

87. Moreover, sale of the entire Maytag Stock risked narrowing the options available to the CMA if it decided, as a result of the Merger investigation, that remedial action was justified. In the early stages of a merger investigation, the CMA would expect existing stock to be retained, so as not to reduce the options available to the CMA for the purposes of any remedial action that may ensue. At the very least, the proposed sale of existing stock, let alone (as in this case) the entirety of the Maytag Stock, was a matter that engaged the requirement to obtain the prior written consent of the CMA. An application for consent made by JLA would have enabled JLA to draw relevant facts to the attention of the CMA, which the CMA would have been able to take into account in deciding whether to grant consent (in respect of the sale of the whole or a part of the Maytag Stock) by way of a derogation from the prohibitions in the IEO.

88. The CMA finds that, for these reasons, the sale of the Maytag Stock was action which might have impaired the ability of the Washstation business to compete independently in any of the markets affected by the Merger, and so required the prior written consent of the CMA. Since JLA and Vanilla failed to obtain such consent, the CMA has decided that there has been a failure to comply with paragraph 4(c) of the IEO.

JLA's submissions

89. JLA told the CMA that Maytag machines were not required in the Washstation business, as customers had decided, post-Merger, 'to use a JLA proposal and Alliance machines' and that as they were Maytag machines they were not needed in JLA's on-going business.[52] However, the CMA's view is that where, following the commencement of the IEO, *some* customers wish to change the machines installed on their sites, that does not

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[51] Response of Hold Separate Manager dated 31 July 2018 to the CMA on issues arising from having to purchase machines from JLA, as the Maytag stock had been sold.

[52] Response of JLA dated 28 August 2018 to the section 109 Notice, at paragraph 2.2.

mean that JLA is permitted to sell the *entirety* of the Maytag Stock without the CMA's prior written consent. The fact that the machines were not needed in JLA's on-going business does not affect that view, since JLA was required to avoid action which risked impairing the ability of the Washstation business to compete independently of the JLA business.

90. JLA subsequently made a number of further submissions.

91. First, JLA submitted that since the Maytag machines sold to Mr V formed part of the JLA business (as defined in the IEO), the sale of those machines could not be considered to have had the potential to impair the ability of the Washstation business (as defined in the IEO) to compete independently.[53]

92. However, in the CMA's view, the fact that the Maytag Stock constituted assets of JLA, rather than assets of the Washstation business, did not enable JLA to avoid the application of the IEO. Following the Merger, JLA controlled Washstation and the Washstation business. Absent the sale of the Maytag Stock, JLA could have made those machines available to the Washstation business (as it did in respect of Alliance machines after the Maytag Stock had been sold). The action of selling the Maytag Stock deprived the Washstation business of ready access to the principal type of machine used by that business and thereby risked impairing the ability of the Washstation business to compete independently.

93. Secondly, JLA submitted that the sale of around 100 machines could not be considered to have had the potential to impair the ability of the Washstation business (as defined in the IEO) to compete independently given that those machines were surplus to requirements.[54]

94. However, in the CMA's view, as stated in paragraph 83 above, by selling the *entirety* of the Maytag Stock, JLA risked narrowing the options available to the HSM in, and increased the costs for the HSM of, running the Washstation business. In these circumstances, it was not for JLA to make an assumption that such a disposal would not have the potential to impair the ability of the Washstation business to compete independently. The proper course was for JLA to approach the CMA for consent, as JLA's action of selling the entirety of the Maytag Stock *risked* impairing the ability of the Washstation business to compete independently for the purposes of the IEO. As the CAT has observed, '*it is of the utmost importance that interim orders*

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53 JLA representations letter dated 28 November 2018, at paragraph 1.26.

54 JLA representations letter dated 28 November 2018, at paragraph 1.26.

be scrupulously complied with, and that a party should not itself form judgements or reach decisions that are properly for the CMA'.[55]

95. Thirdly, JLA submitted that if the CMA believed that the ability of the Washstation business to compete independently might have been impaired, it could have been expected to have required JLA to take action to remedy the situation.[56] However, in the CMA's view, that submission conflates the question of whether there has been a breach of the IEO with the separate question of the potential remedy to the breach. It is not a defence to the failure to obtain the prior written consent of the CMA for JLA to contend (as it does) that the CMA should have (but did not) issue directions under paragraph 10 of the IEO requiring JLA to acquire the number of Maytag machines sold to Mr V.

96. Fourthly, JLA submitted that the CMA's view in respect of paragraph 4(c) of the IEO is 'totally undermined' by the fact that the CMA's own conclusions of its investigation of the Merger do not state that a stock of machines is required to ensure that Washstation can compete effectively.[57] JLA further submitted that during the period in which the Washstation business has been held separate from the rest of JLA's business there has not (to JLA's knowledge) been any suggestion that Washstation's ability to compete has been impaired by not having access to a larger stock of machines.[58] That was because, in JLA's submission, the machines (Maytag or otherwise) were readily available from OEMs or wholesalers and JLA had a long-standing relationship with Whirlpool which meant that it could order Maytag machines as and when required. JLA added that the particular Maytag models that JLA had acquired with the Washstation business may not have been the most appropriate for installation in any particular case for contracts which the HSM may have won.[59]

97. However, in the CMA's view, those submissions do not assist JLA on the question whether there has been a breach of the IEO. The requirement to obtain the prior written consent of the CMA before taking certain actions is intended to be preventative, and forward-looking. That is consistent with the purpose of the IEO, and paragraph 4(c) in particular, to refrain from action which 'might' impede or impair the specified outcomes. As observed by the CAT, the test catches more than just actual impediments, which is why the

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[55] *Electro Rent Corporation v CMA* [2019] CAT 4 at [206].

[56] JLA representations letter dated 28 November 2018, at paragraphs 1.27 and 1.33.

[57] Ibid, at paragraph 1.28.

[58] Ibid, at paragraph 1.29.

[59] Ibid, at paragraphs 1.30 and 1.31.

onus is on the addressee of an IEO to seek consent from the CMA if their conduct creates the *possibility* of impediment.[60] Taking such action without the prior written consent of the CMA constitutes a breach of paragraph 4(c) of the IEO, irrespective of the subsequent actual consequences of the action.

98. Moreover, as regards JLA's submission that machines (Maytag or otherwise) were readily available, the CMA notes that the HSM told the CMA that Alliance machines were more expensive than the equivalent Maytag machines and that delivery of Maytag machines was less reliable.[61] The CMA's view is that these are matters of fact and assessment which should have been raised by JLA in its application to the CMA for prior written consent for the sale, and that they do not in themselves exclude the possibility that the sale might impede justified remedial action and so require the prior written consent of the CMA, in accordance with the terms of the IEO.[62]

99. In its submissions made in response to the CMA's provisional decision to impose a penalty, JLA stated that it was inaccurate to allege that sale of the machines narrowed the options for the HSM when the Washstation business was competing for new business. JLA added that as tenders are very bespoke and customer requirements are all unique, it is incorrect to assume that all the types of machine that had been acquired with the Washstation business would have been suitable for any of the tenders for which the HSM bid following his appointment.[63]

100. However, JLA's submission contradicts other points it has made. JLA had told the CMA that the Maytag Stock included machines that had been 'acquired in anticipation of planned Washstation installations'.[64] To the extent that the Maytag Stock had been sold and was no longer available to the Washstation business, JLA's action risked narrowing the options for competing for new contracts, since it was not possible to exclude from the outset the possibility that the Maytag Stock would be suitable for at least some of Washstation's future tenders.

101. JLA also referred to the HSM's comments to the CMA that Alliance machines were more reliable and using Alliance machines could be seen as

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[60] *ICE/Trayport* at [223].
[61] See paragraph 84 above.
[62] *ICE/Trayport* at [223].
[63] JLA Representations dated 8 February 2019, at paragraphs 5.2 and 5.4.
[64] See paragraph 20 above.

an opportunity to use a better quality machine at a competitive price. JLA submitted that having the ability to supply Alliance machines at attractive prices available from JLA would have assisted the Washstation business by making it more competitive. JLA added that the HSM agreed to use Alliance machines; he was not coerced into doing so and could have chosen at any time to offer Maytag machines which JLA would have procured.[65]

102. The CMA's view is that these submissions do not assist JLA. It is the risk of the sale of the Maytag Stock impairing the ability of the Washstation business to compete independently which is relevant for the purposes of the IEO and which triggers the need for JLA to obtain the prior written consent of the CMA. If JLA considered that the entirety of the Maytag Stock was no longer needed, JLA should have made representations to the CMA to this effect when seeking the prior written consent of the CMA for the sale. As the CAT has observed, '*a party should not itself form judgements or reach decisions that are properly for the CMA … whatever the intentions or incentives of the party involved*'.[66]

103. If JLA had sought the prior written consent of the CMA for sale of the Maytag Stock, the CMA would have considered JLA's representations on their merits. The position in this respect is no different from the consents for derogations from various requirements of the IEO, which JLA did obtain from the CMA between December 2017 and November 2018.

104. JLA further submitted that the action of selling the Maytag Stock did not reduce the options available to the CMA for the purpose of any remedial action as it would have been 'very simple' for the CMA to require JLA to ensure that the divestment package comprised the same machines.[67] However, these submissions confuse a breach of the IEO (that is, the failure to obtain the CMA's prior written consent) with the different power of the CMA to take steps to deal with the situation created by the breach. It is no defence to the breach of failing to obtain the CMA's prior written consent for certain action to contend that the CMA has other powers to take appropriate steps to repair the position.

(iii) Disposal of assets (paragraph 5(e)(ii) of the IEO)

105. Section 72(2)(b) of the EA02 provides that, for the purposes of preventing pre-emptive action, an IEO may 'impose on any person concerned

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[65] JLA Representations dated 8 February 2019, at paragraph 5.5.

[66] *Electro Rent Corporation v CMA* [2019] CAT 4 at [206].

[67] JLA Representations dated 8 February 2019, at paragraph 5.6.

obligations as to … the safeguarding of any assets'. Accordingly, paragraph 5 of the IEO required JLA and Vanilla, at all times during the period the IEO has effect, to procure that, except with the prior written consent of the CMA: … (e)(ii) except **in the ordinary course of business for the separate operation of the two businesses,** none of the assets of the Washstation business or the JLA business are disposed of (emphasis added).

106. The requirement that 'none of the assets of the Washstation business or the JLA business are disposed of' without the prior written consent of the CMA is qualified by an exception. However, it is important to note at the outset the general point that exceptions to requirements in an IEO are construed restrictively. The phrase 'the ordinary course of business' for the purposes of the IEO is defined in a specific and narrow sense by paragraph 13 of the IEO. The definition states that the phrase means 'matters connected to the day-to-day supply of goods and/or services by Washstation or JLA', but '**does not include matters … related to the post-merger integration of Washstation and JLA**' (emphasis added).

107. Thus, the IEO requires that the prior written consent of the CMA is obtained by JLA or Vanilla (as applicable) for a disposal of assets of the Washstation business or the JLA business, unless the disposal is in the ordinary course of business (as defined in the IEO) for the separate operation of the two businesses.

108. JLA told the CMA that '[i]n the period following completion of the Merger on 18 May 2017 until 13 December 2017 JLA took a number of actions and decisions relating to the Washstation business. These included integration of business records … and hiving up into the JLA business any machines acquired with the Washstation business'.[68] JLA further told the CMA as regards two contracts recently won by Washstation (offering Maytag machines) that 'it was clear that the Maytag machines JLA had acquired as part of the Washstation business and subsequently hived up to JLA (thereby becoming "JLA assets") would not be used in connection with the Washstation installations at the universities of X and Y. In common with other machines held in stock by JLA which are surplus to requirements, these machines were earmarked for sale in the ordinary course of business'.[69]

109. This shows that JLA 'hived up' the Maytag machines, which JLA had acquired as part of the Washstation business, to become assets of the JLA

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[68] JLA Representations dated 28 November 2018, at paragraph 1.5.

[69] JLA Representations dated 28 November 2018, at paragraph 1.7.

business as part of the post-Merger integration of the Washstation and JLA businesses.

110. As JLA did not intend to use the Maytag machines in connection with the Washstation installations at the universities of X and Y, and as JLA did not use Maytag machines in its own business, JLA regarded the Maytag stock as 'surplus to requirements'.

111. However, the CMA's view is that it is not relevant for an assessment of whether the terms of the IEO have been breached as to whether the Maytag Stock was 'surplus to requirements' at JLA. The terms of the IEO explicitly provided that none of the assets of the Washstation business or the JLA business were to be disposed of (except in the ordinary course of business for the separate operation of the two businesses), and (given Maytag machines were the principal type of machines used by the Washstation business) selling these assets raised the possibility that Washstation's ability to compete independently might have been impaired.

112. In the CMA's view, the acquisition of Maytag machines (which JLA did not use in its business) is not a matter connected to the day-to-day supply of goods and/or services by JLA, nor is the 'hiving-up' to JLA of the acquired Maytag machines. Both matters arose in connection with JLA's acquisition of Washstation and subsequent integration into JLA of the Washstation business.

113. Therefore, the CMA's view is that the decision to sell the Maytag Stock for which JLA had no commercial use, was a matter related to the post-Merger integration of Washstation and JLA, and as such expressly excluded from the definition of 'the ordinary course of business' by paragraph 13 of the IEO.

114. The fact that it may have been usual practice for JLA to sell off unwanted stock following the acquisition of a company and the subsequent integration of that company's business into JLA is irrelevant to the matters in question in the present case. JLA has accepted that, as from 13 December 2017 when the IEO came into effect, JLA was 'required to cease to continue to act as it had done'[70] before, and was required to act in accordance with the terms of the IEO. Moreover, as the CAT observed in *Electro Rent*: "*A given course of action being in the best interest of a business, does not mean that it is, thereby, in the ordinary course of business, and certainly not as defined in paragraph 13 [of the IEO]*."[71]

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[70] JLA Representations dated 28 November 2018, at paragraph 1.5.

[71] *Electro Rent Corporation v CMA* [2019] CAT 4, at [128].

115. JLA also told the CMA that the decision to dispose of the surplus stock of Maytag machines arising from the acquisition had been taken by the CFO. JLA said: 'From soon after the acquisition [of Washstation] the CFO had been aware of the surplus stock issue and the Group Supply Chain Director had been tasked with disposing of these machines as quickly and profitably as possible.'[72]

116. The CMA's view is that the sale of Maytag Stock to Included Laundry was specific, one-off, action taken in order to dispose of a particular stock of Maytag machines, which had become JLA assets as part of the integration of the Washstation and JLA businesses, but which JLA did not use in its day-to-day supply of goods and services.

117. The CFO, faced with Maytag stock which had been acquired as part of the Merger, but was of no use to JLA, 'charged the Group Supply Chain Director' to dispose of it, 'as soon as possible'. This decision of the CFO, taken in response to this specific set of circumstances, shows that the disposal was action which 'related to the post-merger integration of Washstation and JLA' and so was action expressly excluded from the definition of 'ordinary course of business' in paragraph 13 of the IEO.

118. Moreover, the exception in paragraph 5(e) of the IEO applies in respect of action in the ordinary course of business 'for the separate operation of the [Washstation and JLA] businesses'. The fact that the assets (at the time they were sold) were JLA assets and that the JLA business was run separately from the Washstation business does not mean that the sale of the Maytag Stock was 'for the separate operation of the two businesses'. The sale was in respect of the entirety of the Maytag Stock, which was the principal type of machines used by Washstation in its business (and which amounted to a point of competitive differentiation) and which were not used by JLA in the JLA business. Accordingly, the CMA's view is that the sale of the Maytag Stock does not constitute action for the separate operation of the two businesses.

119. In view of the foregoing, the CMA's finding is that the sale of the Maytag Stock was not in the ordinary course of business for the separate operation of the two businesses and therefore was not action within the scope of the exception in paragraph 5(e) of the IEO. JLA was therefore required by paragraph 5(e)(ii) of the IEO to have the prior written consent of the CMA for the sale of the Maytag Stock.

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[72] JLA response to the Section 109 Notice dated 13 August 2018, at paragraph 2.3.

120. Since JLA and Vanilla failed to obtain the prior written consent of the CMA for the sale, the CMA has decided that there has been a failure to comply with paragraph 5(e)(ii) of the IEO.

JLA's submissions

121. In its representations dated 28 November 2018, JLA made five submissions why the sale of the Maytag stock was made 'in the ordinary course of the operation of the JLA business'.[73]

122. JLA's first submission is that the sale was 'in the ordinary course of the operation of the JLA business' noting that the Maytag Stock concerned had already been 'hived up' into the JLA business prior to the commencement of the IEO.[74]

123. However, that submission misunderstands the operation of paragraph 5(e) of the IEO. The fact that assets were 'hived up' into JLA and had become JLA assets does not in itself bring the sale of the Maytag Stock within the exception in paragraph 5(e).[75] First, paragraph 5(e) expressly refers to a disposal of assets 'of the Washstation business **or** the JLA business' (emphasis added).

124. Secondly, a disposal of JLA assets is neither 'in the ordinary course of business' (as defined in the IEO) nor 'for the separate operation of the two businesses' simply on the basis that the JLA business is separate from the Washstation business. As explained in paragraphs 116 and 118 above, the CMA's view is that a sale of the *entirety* of the Maytag Stock, which was the principal type of machine used by the Washstation business and which were not used by JLA in the JLA business, is a matter related to the post-Merger integration of Washstation and JLA, and so excluded from the definition of 'the ordinary course of business' for the purposes of the IEO.

125. Accordingly, the CMA's view is that the sale of the Maytag Stock does not constitute action in the ordinary course of business for the separate operation of the two businesses.

126. JLA's second submission is that the sale of around 100 machines (in this case) is not unusual and is certainly in the ordinary course of business given

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[73] JLA Representations dated 28 November 2018, at paragraph 1.21.

[74] JLA Representations dated 28 November 2018, at paragraphs 1.21 and 1.22.

[75] The action of 'hiving up' the Maytag Stock into JLA took place prior to the IEO and is accordingly covered by the exception in paragraph 3 of the IEO. However, that does not mean that action in respect of that stock which took place *after the IEO came into force* falls outside the scope of the IEO.

that it sells over [✂],000 machines each year (ie in addition to machine installations connected to its vend-share activities and fixed rental business).[76]

127. However, that submission fails to address the specific requirements of paragraph 5(e)(ii) of the IEO – in particular, that the CMA's prior written consent is required where the disposal is a matter (as here) related to the post-Merger integration of the Washstation and JLA businesses, or where the disposal is not 'for the separate operation of the two businesses.' JLA may indeed sell machines on a regular basis to customers, but such sales are not subject to the specific requirements of an IEO, as was the case with the sale of Maytag Stock to Mr V.

128. In the present case, the view of the CMA is that the sale of the *entirety* of the Maytag Stock, which was the principal type of machine used by the Washstation business, was action which might prejudice the reference or impede justified action by the CMA, and as such needed the prior written consent of the CMA.

129. JLA's third submission was that the sale was 'part of the operation of the JLA business per paragraph 5(e) of the IEO' and '[t]he paragraph plainly includes asset divestitures since the issue of divestitures is specifically referred to in paragraph 5(e)(ii).'[77]

130. However, that submission fails to address the fact that paragraph 5(e)(ii) imposes a prohibition – 'none of the assets of the Washstation business or the JLA business are disposed of' – subject to two exceptions: (i) that the action is 'in the ordinary course of business [as defined] for the separate operation of the two businesses', failing which (ii) that the CMA gives prior written consent. In that context, it is not sufficient for JLA to submit that the action is one which, in other circumstances, it would have carried out. JLA and Vanilla must comply with the requirements of the IEO.

131. As has been pointed out above, the definition of 'ordinary course of business' exludes 'matters … related to the the post-merger integration of Washstation and JLA'. The sale, following the integration of the JLA and Washstation businesses, of the entirety of the Maytag Stock, which was the principal type of machine used by the Washstation business, was a matter which might arouse the reasonable concern of the CMA that it might

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[76] JLA Representations dated 28 November 2018, at paragraph 1.23.

[77] JLA Representations dated 28 November 2018, at paragraph 1.24.

prejudice the reference or impede justified action by the CMA, and as such required the prior written consent of the CMA.

132. JLA's fourth submission is that '[d]ivesting stock that is unwanted or has costs of retention that could be avoided is an inherently ordinary business activity'.[78]

133. However, that submission fails to address the specific requirements of the IEO. Paragraph 5(e)(ii) prohibits the disposal of any assets of the Washstation business or the JLA business unless an exception applies. It is insufficient therefore that the stock which is to be divested is unwanted by JLA or that JLA would ordinarily sell such stock following an acquisition of another company. It is necessary to follow the requirements of the IEO, as outlined above.

134. JLA's fifth submission is that since the IEO definition of conduct that is not 'ordinary' includes 'significant changes to the organisational structure', it follows that 'ordinary' has a 'plain meaning' and that something that is extraordinary for these purposes has a correspondingly 'exceptional nature'.[79]

135. However, that submission ignores the fact that the exception in the IEO definition of 'ordinary course of business' is in respect of 'matters involving significant changes to the organisational structure **or** related to the post-merger integration of Washstation and JLA' (emphasis added). The use of 'or' is important and means that a matter that is related to post-Merger integration does not have to be 'significant' for the exception to apply.

136. For the reasons set out above, in the circumstances of the sale of the Maytag Stock, the CMA concludes that the action fell outside the definition of 'ordinary course of business for the separate operation of the two businesses' for the purpose of the IEO, and so required the prior written consent of the CMA. JLA made further submissions on the 'ordinary course of business' in the context of the proposed amount of the penalty[80] and those submissions are addressed in the section below dealing with the penalty imposed.

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[78] JLA repreasentations dated 28 November 2018, at paragraphs 1.24.

[79] JLA Representations dated 28 November 2018, at paragraph 1.24.

[80] JLA Representations dated 20 February 2019, at paragraphs 2.6 to 2.9.

(iii) Conclusion on failure to comply with the IEO

137. For the reasons set out above, the CMA has decided that JLA and Vanilla, jointly and severally, have failed to comply with the IEO, which is an interim measure within the meaning of section 94A of the EA02.

Without reasonable excuse

138. Section 94A(1) of the EA02 provides that penalties can be imposed if a failure to comply is "without reasonable excuse".

139. Once a breach of an IEO is established, the person who has committed the breach bears the evidential burden of setting out a prima facie case for reasonable excuse. Any excuse must be objectively reasonable.

140. JLA initially reserved its position on this point and added that "[i]f the CMA considers … that the IEO required JLA to seek consent to implement the agreement to sell the machines to V then JLA had a reasonable excuse to do so" on the basis of JLA's interpretation of paragraph 3 of the IEO.[81] As explained in paragraph 76 above, the CMA disagrees with JLA's interpretation of the scope of paragraph 3 of the IEO: acts that are *implemented* after the IEO do not engage the exception in paragraph 3 of the IEO, even if it is the case (which is denied here) that a legally binding agreement was made before the IEO.

141. The CMA's statement of policy regarding its powers to impose administrative penalties (the Guidance) states that the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis; and that the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the company's control, has caused the failure to comply (and the failure would not otherwise have taken place).[82] There is nothing to suggest that any such event has occurred in this case. The CMA accepts that it may be possible to establish other objectively reasonable excuses for breaching an IEO. However, as observed by the CAT, for a party to rely on a reasonable commercial rationale is to address the wrong question,[83] and it is not a

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[81] JLA Representations dated 28 November 2018, at paragraphs 1.35 and 1.36. See also JLA Representations dated 8 February 2019, at paragraph 7.1.

[82] Guidance at 4.4

[83] *Electro Rent Corporation v CMA* [2019] CAT 4, at [189].

mitigating factor that a party considers that there were good commercial reasons for its action.[84]

142. In its representations on the CMA's provisional decision, JLA submitted that it had a reasonable excuse for the alleged breach on the following grounds: given that detailed discussions with Mr V about the sale of the machines had taken place prior to the IEO, JLA had "(even if mistakenly) believed a deal had been struck prior to the IEO with only some final details to be confirmed"; and those involved in the discussions were not lawyers and JLA did not inform internal or external counsel about the proposed sale when the IEO came into force.[85]

143. However, in the CMA's view, it is neither a reasonable excuse that a party fails to take appropriate advice as to its proposed actions, knowing that an IEO is in force, nor can it be a mitigating factor that a party failed to do so. JLA is a well-resourced company that had access to legal advice, including from its in-house counsel. Given that the sale was of the *entirety* of the Maytag Stock, which was the principal type of machine used by the Washstation business and given the importance of adherence to the IEO, it is the CMA's view that it is not a reasonable excuse to have proceeded with the sale (notwithstanding that discussions about the matter pre-dated the IEO) without having first consulted the CMA.

144. The CMA's view is that the sale of the Maytag Stock created the possibility of prejudice to the reference or an impediment to justified remedial action. It risked impairing the ability of the Washstation business to compete independently and/or it was not in the ordinary course of business for the separate operation of the two businesses. It was foreseeable that the CMA might have reasonable concern given that the *entirety* of the Maytag Stock would be sold and therefore that JLA or Vanilla should obtain the prior written consent of the CMA for the sale.

145. The CMA therefore concludes that JLA and Vanilla had no reasonable excuse for failing to comply with the requirements of the IEO which have been identified above.

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84 *Electro Rent Corporation v CMA* [2019] CAT 4, at [201].

85 JLA Representations dated 8 February 2019, at paragraph 7.2.

Appropriateness of imposing a penalty at the level proposed

Appropriateness of imposing a penalty

146. Having had regard to its statutory duties and the Guidance, and having carefully considered all relevant facts, the CMA considers that the imposition of a penalty is appropriate. In reaching this view, the CMA has had regard to the need to achieve specific and general deterrence, as well as the seriousness of the breaches in this case among other considerations.

General deterrence

147. The CMA considers that it is of utmost importance to the UK's voluntary, non-suspensory regime that interim measures should be effective, particularly in the small number of completed mergers which the CMA identifies as warranting review. Interim orders (including the IEO) serve a particularly important function where, as in this case, the Merger was completed. Their function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision. The purpose of an IEO, as recently noted by the CAT, is precautionary, guarding against the possibility of pre-emptive action.[86]

Specific deterrence

148. JLA and Vanilla remain subject to commitments to maintain the parts of the Washstation business which are to be divested under the final undertakings accepted on 13 December 2018. It is therefore important for the CMA's ability to conduct effective and efficient investigations that parties have due regard to the requirements imposed on them and to emphasise to businesses to whom the UK's merger regime applies the importance of compliance and the seriousness of a failure to comply without a reasonable excuse.

Seriousness of the breach

149. The failure of JLA and Vanilla to comply was of a serious nature.[87] For the reasons set out at paragraph 55 the provisions breached reflect core objectives of interim measures. Their breach is thus a fundamental breach of

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[86] *ICE/Trayport* at [220]. See also paragraphs 52 to 55 above.

[87] Guidance at 4.2.

the obligation imposed in accordance with section 72 of the EA02 via the IEO.

150. As set out below, it was reasonably foreseeable at the time that the breaches were committed that they might impede the CMA's ability to take remedial action which might be justified by the CMA's decisions on the reference.

151. The sale was of the entirety of the Maytag Stock, which was the principal type of machine used by the Washstation business.

152. Moreover, the failure of JLA and Vanilla to comply was committed due to the acts and omissions of the senior management of JLA. Mr Z, the Chief Executive Officer, signed the compliance statements required by the IEO[88] on behalf of JLA and Vanilla. The sale was approved by Mr R (Chief Finance Officer of JLA) and Mr P (Trade & Export Sales Director of JLA). All of the Directors of JLA were aware of the sale and of the obligations created by the IEO.

Other considerations relevant to the breach

153. JLA and Vanilla have in-house counsel and have used external solicitors and counsel during the CMA's investigation of the Merger. The CMA considers that JLA and Vanilla have sufficient internal administrative resources available to ensure compliance.

Appropriateness of the amount of the penalty proposed

154. Consistent with its statutory duties and the Guidance[89], the CMA has assessed all relevant circumstances to determine an appropriate level of penalty. It has also taken account of the following aggravating and mitigating factors in line with the Guidance.

Aggravating factors

155. The CMA has taken into account the following aggravating factors, which point towards a higher penalty.

156. First, as noted above (at paragraph 35), the information provided by Mr V during the CMA's investigation of the circumstances of the sale showed that

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[88] Guidance at 4.11 eighth bullet; paragraph 7 of the IEO requires JLA and Vanilla to provide periodic compliance statements.
[89] Guidance at 4.11.

there were emails sent within JLA by Mr S and Mr P dated 18 December 2017, and an email exchanged between Mr P and Mr V, dated 4 January 2018, which JLA did not provide to the CMA. These avoidable gaps in the documents (and gaps revealed as to the relevant information) provided by JLA in relation to the sale of the Maytag Stock resulted in the CMA having to expend further resources in investigating the matter by making enquiries of Mr V, resulting in increased public expense.

157. Second, the failure to comply with the IEO was due to the acts and omissions of the senior management of the JLA and Vanilla businesses in instigating and approving the sale of the Maytag Stock, including the Chief Executive Officer, who signed the compliance statements under the IEO.

Mitigating factor

158. The CMA has also taken account of the following mitigating factor in line with the Guidance, namely that the actual adverse effect which the breach had on the CMA's ability to take remedial action is likely to be limited.[90]

Financial resources

159. The CMA has also had regard to the financial resources available to JLA and Vanilla. The turnover of the JLA Group in the financial year 2017 was approximately £118 million[91]. This indicates that the JLA Group has significant financial resources available in respect of the imposition of a penalty for the breach in question in this case.

JLA's submissions

160. As regards the aggravating factors, JLA explained that the gaps in the emails provided in response to the CMA's request were due to circumstances beyond the control of senior management – in summary, Mr P's emails were deleted around the time he left JLA in February 2018 and Ms Q regularly deleted emails on which she was copied and which did not contain action points for her.[92] JLA submitted that in the circumstances it would be appropriate to reduce materially the amount of the proposed penalty, without affecting the CMA's desire to achieve deterrence.[93]

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[90] Guidance at 4.11, second bullet.

[91] JLA Equityco Limited Report and Financial Statements, 31 October 2017, page 11.

[92] JLA Representations dated 8 February 2019, at paragraphs 6.2 and 9.3, and also 3.6 and 3.8.

[93] JLA Representations dated 8 February 2019, at paragraph 6.4.

161. The CMA's view is that, although JLA's submissions have explained the reason for the gaps in the material provided to the CMA in response to the section 109 Notice addressed to JLA, these circumstances do not mean that the gaps in the material do not amount to an aggravating factor, or that the reasons for the gaps otherwise warrant a reduction in the level of the proposed penalty. In the CMA's view, companies subject to an IEO should ensure the retention of documents relating to matters that are the subject of the IEO, including re-visiting their document retention policies and practices in light of the IEO. As the CAT has observed "*[i]t is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed*".[94]

162. As regards mitigating factors, JLA made the following submissions. First, JLA submitted that given detailed discussions with Mr V about the sale of the machines had taken place prior to the IEO, JLA had "(even if mistakenly) believed a deal had been struck prior to the IEO with only some final details to be confirmed"; and that those involved in the discussions about the sale of the Maytag Stock were not lawyers and JLA did not inform internal or external counsel about the proposed sale when the IEO came into force.[95] However, in the CMA's view, it is neither a reasonable excuse that a party fails to take appropriate advice as to its proposed actions, knowing that an IEO is in force, nor can it be a mitigating factor that a party failed to do so. JLA is a well-resourced company that had access to legal advice, including from its in-house counsel. Given that the sale was of the *entirety* of the Maytag Stock, which was the principal type of machine used by the Washstation business and given the importance of adherence to the IEO, it is the CMA's view that it is not a reasonable excuse or a mitigating factor for JLA to have proceeded with the sale (notwithstanding that discussions about the matter pre-dated the IEO) without having first consulted the CMA.

163. JLA also submitted that it was a mitigating factor that the actual adverse effect of the breach had not only a limited impact on the CMA's ability to take remedial action, but that it could have had 'no impact whatsoever'. JLA added that the CMA could have ordered JLA to replace the exact machines had it deemed it necessary and appropriate to do so.[96] It added further that, unlike the Electro Rent situation, the Maytag machines were not an integral part of the remedy.[97]

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[94] *Electro Rent Corporation v CMA* [2019] CAT 4, at [200].

[95] JLA Representations dated 8 February 2019, at paragraph 7.2.

[96] JLA Representations dated 8 February 2019, at paragraph 8.1 and 5.6.

[97] JLA Representations dated 20 February 2019, at paragraphs 2.11 and 2.19.

164. As stated in paragraph 158 above, the CMA has already taken into account, as a mitigating factor in accordance with the Guidance, the fact that the actual adverse effect which the breach had on the CMA's ability to take remedial action is likely to have been limited. However, the CMA does not accept JLA's submission that there could be no impact whatsoever. JLA's submission that the CMA could have taken remedial action confuses the matter of the breach (the failure to obtain prior written consent) with the matter of possible remedies for the breach. In the CMA's view, the fact that remedial action has not been taken or was not necessary does not constitute a further mitigating factor.[98]

165. JLA also made a number of submissions on the level of the penalty proposed in the CMA's provisional decision (£120,000) which it claimed was unfair, discriminatory and disproportionate when compared with the penalties imposed by the CMA on Electro Rent Corporation.[99] JLA sought to draw out various distinctions between the circumstances of its conduct and those in relation to Electro Rent Corporation which, in JLA's submission, meant that the proposed penalty on JLA should be materially reduced.[100]

166. JLA submitted that there was no suggestion in the CMA's provisional decision that JLA deliberately or knowingly sought to circumvent or breach the IEO; the event in question (that is, the sale of the Maytag Stock) was on the basis of discussions before the IEO was imposed and took place at the start of the phase 1 investigation; and the breach could not be described as being significant and flagrant.[101]

167. The CMA considers that this submission fails to take into account that the breach consists of failing to obtain the CMA's prior written consent for certain actions which might prejudice the reference concerned or impede the taking of justified remedial action. The seriousness of a breach is not diminished by virtue of it having occurred at an early stage of the CMA's investigation. To hold otherwise would undermine the policy imperative of incentivising the companies in question to comply with the IEO at all times. As regards JLA's

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[98] Moreover, as the CAT has pointed out, even if it were the case that '*the company in breach [of an IEO] subsequently adopted remedial measures, [that is] no answer to the policy objective of incentivising compliance. The effectiveness of a penalty in deterring other companies is to a large extent likely to depend on the degree to which the penalty figure is one that will be perceived by third parties as illustrating the serious consequences of violating interim measures*' (*Electro Rent Corporation v CMA* [2019] CAT 4, at [221]).

[99] JLA Representations dated 20 February 2019, at paragraph 2.23. The CMA decisions in relation to Electro Rent Corporation were dated 11 June 2018 and 11 February 2019.

[100] For example, JLA made a number of points as to the point in the CMA's investigation at which the actions in question occurred, and the extent to which the conduct was in the 'ordinary course of business' (JLA Representations dated 20 February 2019, at paragraph 2.1 et seq).

[101] JLA Representations dated 20 February 2019, at paragraphs 2.2 to 2.5.

submission that it did not deliberately or knowingly seek to circumvent or breach the IEO, the CMA's view is that this is not a mitigating factor.

168. JLA further submitted that as JLA sells machines as part of the ordinary trading operations of its business and it sells more than [✂],000 laundry machines across all channels annually, the sale of 156 machines was only a small proportion of one part of JLA's ordinary business operations. JLA added that even if it were accepted that for the purposes of the IEO the sale of the Maytag Stock was not in the ordinary course of business, in the circumstances there was good reason as to why JLA believed it to be so.[102] JLA also submitted that its conduct merited a reduction in the level of the proposed penalty as it had continued "wholly permissible interactions with V following the imposition of the IEO".[103]

169. However, in the CMA's view, JLA's submissions on these points (amounting to potential mitigating factors) miss two critical points. First, although only 156 machines were sold, the sale was of the *entirety* of the Maytag Stock, which was the principal type of machine used by the Washstation business. Secondly, as JLA accepted, as from 13 December 2017 when the IEO came into force, JLA was required to cease to act as it had done before, and was required to act in accordance with the terms of the IEO.[104] Moreover, as the CAT has stated, '*the obvious way in which to reconcile the requirements of business continuity and protection of the merger process*' is to have '*full and frank discussions with the CMA as to the implications of the IEO for any adjustments to the terms of [a commercial] relationship that are required in the ordinary course of business*'.[105]

170. JLA futher submitted that none of JLA's senior management were directly involved in the sale of the Maytag Stock or had any contact with Mr V on the matter or negotiated with him.[106] However, this is inconsistent with what JLA has told the CMA before: that its Trade & Export Sales Director conducted the sale arrangements, the sale was approved by JLA's Chief Finance Officer and the Chief Executive Officer of JLA signed the compliance statements required by the IEO.[107] Therefore, the CMA's view is that the senior management of JLA had responsibility for JLA's compliance with the

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[102] JLA Representations dated 20 February 2019, at paragraphs 2.7 and 2.8.

[103] JLA Representations dated 20 February 2019, at paragraph 2.15.

[104] See paragraph 114 above.

[105] *ICE/Trayport* at [223].

[106] JLA Representations dated 20 February 2019, at paragraph 2.17.

[107] JLA Representations dated 20 February 2019, at paragraph 2.17.

terms of the IEO and the breach was committed due to their acts and omissions.

171. JLA also submitted that, in contrast to *Electro Rent* (in respect of which it submitted that the impact of Electro Rent's breach was considered to have been material), the CMA's provisional decision did not allege that the impact of JLA's conduct was material. In JLA's view, that warranted a reduction in the level of the proposed penalty on JLA.[108]

172. However, in the CMA's view, JLA has mis-applied *Electro Rent*. In the CMA's view, the CAT was not purporting to establish a materiality test concerning the impact of conduct when determining the appropriateness of imposing, or setting the level of, a penalty.[109] The CAT added that "*[i]t is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed*".[110] JLA's submission also fails to recognise the important role that penalties play in furtherance of the key policy imperative of incentivising the companies in question to comply with an IEO.

173. JLA made further submissions in terms of the size of the penalty. It submitted that, in its view, the penalties in the Electro Rent case appeared to be materially lower as a percentage of the purchase price [of Microlease] than the proposed JLA penalty as a percentage of the purchase price of Washstation. JLA also submitted that, in terms of the statutory maximum penalty that could be imposed, the proposed penalty on JLA was materially higher than either of the penalties on Electro Rent.[111]

174. However, in the CMA's view, the proper approach to the assessment of administrative penalties is on a case by case basis, having regard to the relevant facts, the statutory limits imposed by section 94A(2) of the EA02 and the Guidance. In the present case, the CMA's view is that a penalty of £120,000 on JLA and Vanilla (as proposed in the CMA's provisional decision) is appropriate and proportionate, having had regard to all the circumstances and in particular the nature of the breach and taking into account the aggravating and mitigating factors.

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[108] JLA Representations dated 20 February 2019, at paragraph 2.18.

[109] The CAT noted the materiality of Electro Rent's conduct only after taking into account the fact that the conduct in question had occurred "*in the context of the public importance of a clear and enforced merger control process*" (*Electro Rent Corporation v CMA* [2019] CAT 4, at [200]).

[110] *Electro Rent Corporation v CMA* [2019] CAT 4, at [200].

[111] JLA Representations dated 20 February 2019 paragraphs 2.21 and 2.22.

Conclusion on the imposition of a penalty

175. Although the CMA has the power to impose a penalty of up to 5% of global turnover (which in this case would amount to approximately £5.54 millon), the CMA does not consider that the breach in this case is so serious as to warrant a penalty at the upper end of the scale.

176. In all the circumstances, the CMA finds that the imposition of a penalty of £120,000 is appropriate and proportionate for the reasons given above and in particular that: (i) it would reflect the seriousness of the breach; (ii) it would act as a deterrent to other companies and to JLA and Vanilla in the future; and (iii) it is substantially below the statutory maximum of 5% of global turnover (at approximately 0.1% of turnover, the penalty is not disproportionate in this case).

177. In all the circumstances, the CMA finds that the imposition of a penalty of £120,000 (which is substantially below the statutory maximum of 5% of global turnover) is appropriate and proportionate in this case, and hereby imposes such penalty under section 94A of the EA02.

Andrea Gomes da Silva

Executive Director, Mergers and Markets

8 March 2019

Competition and Markets Authority

Appendix 1

The CMA's investigation of the facts

1. The CMA first became aware of the sale by JLA of 156 laundry machines that it had acquired as part of the Merger on 4 June 2018. The 2nd Report of the Monitoring Trustee, dated 4 June 2018, stated that:

> 'We understand that at the time of the acquisition, Washstation held machines at customer sites, together with machines and a limited amount of spares stored at a warehouse (in respect of which the lease was surrendered prior to the date of the Order). […] We understand that assets held in the warehouse were in the main subsumed into JLA's fixed assets or placed at customer sites, with JLA handling fixed assets for Washstation on an integrated basis with Circuit.We have been informed that in January 2018 JLA sold back to the previous owner of Washstation certain machines which were not considered to be of sufficient quality. We have been informed that this involved 70 – 100 machines, and that the consideration was c.£[✂],000.'[112]

2. On 19 June 2018, the CMA wrote to Mr Z, the Chief Executive Officer of JLA, expressing concerns about the compliance by JLA and Vanilla with the IEO, including the failure of JLA and Vanilla to obtain the prior written consent of the CMA to the sale of the machines to Mr V.

3. On 22 June 2018, Mr Z wrote to the CMA explaining that '[i]n connection with the sale of machines to Mr V, we intend to provide all relevant information to the MT' and that 'it is now very clear to us that you expect that we will engage with you on such matters even when we honestly believe that the IEO does not apply'.

4. On 13 August 2018, in order to clarify the facts and circumstances of the sale of the machines, and to assist the CMA's review of compliance with the IEO, the CMA served a Notice on JLA in exercise of the CMA's investigation powers under section 109 of the EA02, requiring JLA to produce the documents and supply the information specified or described in Annex 1 to the Notice.[113]

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[112] Monitoring Trustee, 2nd Report (4 June 2018) page 10, entry 5(e): Assets.

[113] The Notice required JLA: (i) to provide all documents in its possession that relate to or refer to the sale of Maytag machines; (ii) to supply a description of the internal signoff or approval process for such a sale; (iii) to give details of material sales of other machines since April 2016; (iv) to give details of any instances since January 2016 where JLA has sold machines at a loss; (v) to describe the circumstances in which such a sale would require sign-off by JLA's CFO.

5. On 28 August 2018, JLA responded to the section 109 Notice. JLA submitted that the agreement for the sale of the machines had been reached in early December 2017 before the IEO came into force, and that the sale of machines was, in any event, in the ordinary course of business, and so permitted by the IEO. JLA provided the documents in JLA's possession responsive to the Notice.

6. On 17 September 2018, in order to verify and supplement the information provided by JLA, the CMA served a Notice under section 109 of the EA02 on Mr V as regards the sale of the machines, for the purpose of assisting the CMA's review of JLA's compliance with the IEO.

7. On 17 September 2018, Mr V replied to the Notice and provided supporting documents and related information.

8. The response of Mr V to the section 109 Notice provided further emails sent by JLA between 18 December 2017 and 11 January 2018, both to recipients within JLA (which had been subsequently included in emails sent to Mr V) and between JLA and Mr V. These emails had not been provided by JLA in response to the section 109 Notice addressed to it.

9. The response of Mr V to the section 109 Notice also provided information relating to a telephone conversation he had had with Mr P, a director of JLA, prior to sending his email of 4 January 2018.

10. The information provided by Mr V showed that there were emails sent within JLA by Mr S (JLA's Warehouse Operations Manager) and Mr P (director), dated 18 December 2017, and an email exchanged between Mr P and Mr V, dated 4 January 2018, which JLA did not provide to the CMA in response to the section 109 Notice.

Appendix 2

Initial Enforcement Order, 13 December 2017